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PATENT APPLICATION
IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Serial No.	10/034,720	Examiner:	Charles E. Phillips
Inventor:	Earl J. Braxton	Group Art Unit:	3751
Filing Date:	December 28, 2001		
Title:	Portable Toilet Shelter Having Improved Stackability		

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RESPONSE TO RESTRICTION REQUIREMENT UNDER 35 U.S.C. §121

Assistant Commissioner for Patents
Washington, D.C. 20231

Sir:

In the Office Action of January 16, 2003, Paper No. 4, the Examiner required an election of species in the above referenced patent application. The Examiner has requested an election between the species of Figures 3 and the species of Figure 6. However, the Examiner has not indicated which claims he believes to be directed to any of these species.

In response to the requirement of an election of species, Applicant's attorney provisionally elects the species of Figure 3, but respectfully traverses the requirement of such an election. It is respectfully submitted that Claims 1-3, 5-6, 7-8, 10-11, 12-13, 15-16 and 17 are applicable to the species of Figure 3 and, accordingly, Claims 1-3, 5-6, 7-8, 10-11, 12-13, 15-16 and 17 are generic to all of the species remaining in the application. Examination of these claims, under merits, is therefore respectfully requested. Applicant hereby traverses the restriction requirement under the authority of 37 CFR §§1.143 and 1.146, and MPEP 809.03.

The patent rules are clear that a species restriction is proper where an applicant discloses multiple species and includes claims restricted to those species, unless a generic claim covering all species is found to be allowable. Even then, a species restriction may still be proper if an unreasonable number of species are being claimed. Pursuant to the patent rules, Applicant respectfully submits that independent Claim 1 is generic, as stated by the Examiner, since it reads on both Species I and II. Secondly, a reasonable number of species are being claimed since there are only two. Therefore, under the patent rules the Examiner's restriction is not proper.

The MPEP is also clear in §809.03 that a "linking claim", if allowed, will act to prevent restriction between inventions. The MPEP makes clear that a genus claim linking species claims is an example of such a "linking claim". The MPEP further clarifies that upon allowance of the linking claim, the restriction requirement shall be withdrawn and any claims depending from or otherwise including all the limitations of the allowable linking claim will be entitled to examination in the instant application. Pursuant to the MPEP, Applicant respectfully submits that independent Claim 1 is a genus claim of Species I and II and is allowable. Therefore, under the MPEP regulations the Examiner's restriction is not proper.

Applicant's attorney further respectfully requests that the Examiner reconsider the requirement of an election of species in the above referenced application. The Examiner has set forth no reasons in the above referenced Office Action for requiring such an election except for the statement that "This application contains claims directed to the following patentably distinct species of the claimed invention: Fig. 3 and Fig. 6."

There is no indication whatsoever that the Examiner will be required to make any additional searches or that examination of the claims directed to the various species would be burdensome. Furthermore, the Examiner would not be unduly burdened by disposing of all the species in a single application.

On the other hand, the Applicant is burdened by being compelled to elect a species in the present application, since the Applicant may be compelled as a result of the election requirement to file additional applications in order to obtain protection on all of the species identified by the Examiner. The additional application will result in additional expenses for attorney fees and for government filing fees, as well as duplicate maintenance fees for the various patents which may subsequently issue from the present application. Furthermore, the protection that the Applicant is entitled to on all of the species of the present inventions may be unnecessarily divided between several patents having different issue dates and different expiration dates, causing potential enforcement and licensing difficulties which may very well impede the commercialization of any one of the patent issuing on the specific species.

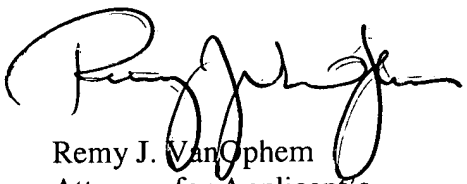
Similarly, there is a substantial public interest in avoiding unnecessary division of a patent application into two or more patents. Such a division creates confusion and less certainty on the part of the patent owner, for the reasons presented above, as well as on the part of competitors due to the differing issue and expiration dates of the patents issuing on the various species. Furthermore, a potential competitor may delay his commercialization of competing devices for a period longer than the normal statutory period for which a patent is enforceable due to the differing expiration dates of the various patents issuing on the different species.

Clearly, then, the interests of the Applicants are outweighed by the minor inconvenience caused by the Examiner by including the various species in a single application. The purpose of granting United States patents is to encourage the early and successful commercialization of new inventions. For the reasons presented above, the early commercialization of the present invention, either by the Applicant, or by competitors, will be best served by withdrawing the election requirement of the outstanding Office Action. The Examiner is therefore respectfully urged to withdraw this requirement.

Applicant's attorney has made a good faith effort to respond to the outstanding Office Action and to enumerate those claims directed to the elected species. In the event that the Examiner has any further questions regarding the above election or in the event that the Examiner desires a further election within the class of elected claims, Applicant's attorney invites the Examiner to initiate a telephone interview so that these issues may be resolved and examination of the claims on the present application on the merits may proceed without further delay. Applicant's attorney may be reached at (810) 362-1210.

Respectfully submitted,

VANOPHEM & VANOPHEM, P.C.



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